UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED TECHNOLOGIES CORPORATION, et al.,	)	
Plaintiffs	)	
v.	)	
BROWNING-FERRIS INDUSTRIES, INC., et al.,	)	
Defendants	)	
---		*Civil No. 92-206-B*
CARLETON WOOLEN MILLS, INC.,	)	
Defendant/Third-Party Plaintiff	)	
v.	)	
FRENCH RIVER INDUSTRIES,	)	
Third-Party Defendant	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON THIRD-PARTY CLAIMS AND THIRD-PARTY PLAINTIFF'S MOTION TO DISMISS

This third-party action is a byproduct of litigation involving the Winthrop Landfill Superfund Site ("Site") in Winthrop, Maine. Carleton Woolen Mills, Inc. ("Carleton") asserts third-party claims for breach of contract and indemnification. *See* Second Amended Third-Party Complaint (Docket No. 76). French River Industries ("FRI") asserts third-party counterclaims for breach of implied covenant of good faith and fair dealing, breach of contract, indemnification and a declaratory judgment. *See* Answer and Counterclaims of Third-Party Defendant French River Industries to the

Second Amended Third-Party Complaint of Carleton Woolen Mills, Inc. (Docket No. 78). The parties have filed cross-motions for summary judgment on Carleton's claims, and Carleton has moved to dismiss FRI's counterclaims.[1] For the reasons set forth below, I recommend that Carleton's summary judgment motion be denied, that FRI's summary judgment motion be granted, and that Carleton's motion to dismiss be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*,

[1] FRI has also moved to strike portions of Carleton's Reply Memorandum (Docket No. 82) and the Affidavit of Arthur M. Spiro (Docket No. 83) to the extent that they refer to an alleged settlement communication between FRI and Carleton in a related state court proceeding. Because I have not considered that communication in reaching my recommended decision, the motion is moot.

917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

Presented with cross-motions for summary judgment, as opposed to motions for judgment on a stipulated record, a court may not decide issues of material fact. *Boston Five Cents Sav. Bank v. Secretary of the Dep't of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985). The mere fact that both parties seek summary judgment does not render summary judgment appropriate. 10A *C. Wright, A. Miller & M. Kane, Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 19. The court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there is any genuine issue of material fact, both motions must be denied; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

II. Procedural and Factual Background

The summary judgment record reveals the following material facts. On January 29, 1986 the United States filed a civil action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, against Inmont Corp., the Town of Winthrop, Everett Savage and Glenda Savage. Recommended Decision on Defendants' Motion for Summary Judgment (Docket No. 39) at 2. The United States alleged that the defendants were jointly

and severally liable under CERCLA for remedying the releases or threatened releases of hazardous substances at the Site and for related cleanup costs. *Id.* The complaint was later consolidated with a similar complaint regarding the Site filed by the state of Maine under CERCLA and state law. *Id.* at 3. On March 23, 1986 the court entered a consent decree in the consolidated cases. *Id.* In that decree the defendants agreed to undertake and complete certain work at the Site and to pay the United States and the state of Maine for response costs incurred prior to entry of the decree. *Id.*

BASF Corp., the successor to Inmont Corp., and BASF's parent corporation, United Technologies Corp., (collectively "first-party plaintiffs") filed the complaint that underlies this third-party litigation on October 16, 1992. *Id.* The complaint sought, inter alia, recovery for past and future response costs incurred in connection with cleanup at the Site. Amended Complaint (Docket No. 3) ¶¶ 37, 48, 52. It alleged that the defendants, including Carleton, had disposed of industrial wastes at the Site "from the early 1950s until at least the early 1980s." Amended Complaint ¶¶ 7, 16-17.

In an October 23, 1992 letter, Carleton informed Edward P. LeVeen, Jr., president of FRI's predecessor company,[2] of the first-party claim against Carleton, and stated that FRI's predecessor was liable to Carleton for Carleton's costs and expenses in connection with the first-party claim. Exh. F to Second Amended Third-Party Complaint. Carleton explained that the basis of this liability was the 1979 Purchase Agreement executed by Carleton and FRI's predecessor. *Id.*

In a letter dated November 11, 1992, counsel for the first-party plaintiffs explained the basis

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[2] Carleton Woolen Mills, Inc., a Maine corporation, *see* Purchase Agreement ("Agreement"), Exh. A to Second Amended Third-Party Complaint at 1, was the predecessor company to FRI, *see* Affidavit of Thomas U. LeVeen ("LeVeen Aff.") (Docket No. 81) ¶¶ 1, 3. By the terms of the Agreement, Carleton Woolen Mills, Inc., a Delaware corporation (the third-party plaintiff), purchased the "business, assets and properties" of Carleton of Maine. Agreement at 1.

for suing Carleton, and asserted that

> from 1972 until the early 1980's, Andy Valley [Refuse Co.] transported wastes from Carleton's two facilities . . . to the Winthrop Landfill. Included in Carleton's waste were wool remnants, wool dust, powdered dyes or pigments of different colors, a white starch-like powder, and 55-gallon cardboard drums with unidentified powders at the bottom.

Exh. J to Second Amended Third-Party Complaint at 2. Counsel stated that hazardous substances found in solvents used in wool manufacturing and dyes and pigments were detected at the Site. *Id.*

Carleton subsequently demanded that FRI indemnify it for litigation costs in the first-party action, and FRI refused. LeVeen Aff. ¶ 11. Carleton filed a third-party complaint against FRI in which it sought: contribution, if and to the extent Carleton lost the first-party action; indemnification for any costs the first-party plaintiffs might recover; and a declaratory judgment that FRI must indemnify Carleton for any such recovery. First Amended Third-Party Complaint (Docket No. 13) ¶¶ 8, 11, 13. On August 11, 1995, after the first-party claims were dismissed,[3] Carleton filed the Second Amended Third-Party Complaint which is now the subject of cross-motions for summary judgment.

Carleton and FRI base their respective claims on the Agreement dated August 30, 1979 between Carleton and FRI's predecessor. The relevant portions of the Agreement read:

> 2.2 Subject to Section 2.3 hereof, [Carleton] agrees to assume and pay, perform and discharge all debts, obligations, contracts and liabilities of [FRI]:
>
> . . .

[3] This court entered summary judgment for the first-party defendants on the federal claims on statute-of-limitations grounds and dismissed the pendent state claims without prejudice. Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 51) at 3, *aff'd*, 33 F.3d 96 (1st Cir. 1994). Although the court no longer has a federal claim before it, it does have supplemental jurisdiction over the third-party claims. *See* 28 U.S.C. § 1367.

(b) arising in the ordinary course of business of [FRI] after April 28, 1979 . . . .

2.3 Notwithstanding Section 2.2 or any other provision to the contrary contained herein, expressed or implied, [Carleton] shall not be liable for and specifically does not assume any liability of [FRI]:

. . .

(b) with respect to any claim or liability (other than a liability included in Section 2.2 above) which is based entirely on events arising prior to [December 19, 1979] and as to which [Carleton], promptly upon first learning of said claim or liability, advises [FRI] in writing fully describing the nature and details thereof, and [Carleton] shall have the obligation promptly to take, at [FRI]'s cost and expense, such action as shall be reasonably necessary to protect [FRI]'s interests;

. . .

(f) . . . or any other liability not otherwise assumed by [Carleton] in this Agreement . . . .

. . .

12.1 [FRI] agrees to indemnify and hold harmless [Carleton] from and against any and all . . . costs and expenses (including reasonable attorneys' fees) arising out of or in connection with the . . . breach of any warranty or any covenant or agreement to be performed by [FRI] hereunder.

12.2 [Carleton] agrees to indemnify and hold harmless [FRI] from and against any and all . . . costs and expenses (including reasonable attorneys' fees) arising out of or in connection with the . . . breach of any warranty or any covenant or agreement to be performed by [Carleton] hereunder.

Agreement at 3-6, 37-38.

III. Discussion

A. Carleton's Third-Party Claims

Carleton alleges in Count I that FRI breached the Agreement by refusing to reimburse it for

costs and expenses incurred in defending the first-party claims, and by forcing Carleton to defend the action at its own cost and expense. Second Amended Third-Party Complaint ¶ 26. Carleton claims that these actions breached sections 2.2 and 2.3(f) of the Agreement, as well as section 2.3(b).

Even assuming, arguendo, that sections 2.2 and 2.3(f) unambiguously provide that Carleton did not assume liability for the first-party claim against it,[4] Carleton has not established that FRI breached those sections. Sections 2.2 and 2.3(f) merely specify the limited liabilities that Carleton assumed. They do not require FRI to reimburse or defend Carleton in the event Carleton is sued for FRI's liabilities. They simply provide a legal basis for Carleton to file a third-party claim for contribution, which is precisely what Carleton originally did in this case.

To prove that FRI breached section 2.3(b), Carleton must show that the first-party claim was "based entirely on events arising prior to [December 17, 1979]." Agreement ¶ 2.3(b). As first-party plaintiffs' counsel stated in the previously referenced November 11, 1992 letter, *see* Exh. J. to Second Amended Third-Party Complaint, the first-party action was based on waste disposal at the Site from the 1950s until the early 1980s.[5] Carleton argues that, because *most* of the events preceded

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[4] FRI argues that Carleton assumed liability under section 2.2(b) for the first-party claim because it arose in the ordinary course of FRI's business, i.e., dumping trash at the Site, after April 28, 1979. Carleton responds that section 2.2(b) was merely intended to assure that Carleton would honor whatever obligations FRI created from April 28, 1979 until the closing date, and that it was not intended to transfer liability under CERCLA, which had not yet been enacted. Although FRI's interpretation is not wholly unreasonable, courts should not shift CERCLA liability where the agreement predates CERCLA absent language "broad enough to allow us to say that the parties intended to transfer either contingent environmental liability, or all liability." *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993) (applying Massachusetts law).

[5] Carleton's assertion that it never dumped hazardous waste at the Site is unavailing because it does not alter the basis of the first-party claim: events occurring from the 1950s until the early 1980s. Nevertheless, I note that the document on which Carleton bases its assertion merely states that "to the best of [Carleton's] knowledge" it never caused hazardous waste to be taken to the Site. (continued...)

the closing date, the claim falls within section 2.3(b). It makes a related argument that, because each act of disposal constitutes an independent basis of liability for purposes of the first-party claim, "each such event arose 'entirely' prior to the Closing Date." Carleton's Reply Memorandum at 5. Although these arguments might be relevant in apportioning liability for the first-party claim, they cannot subvert the plain language of the Agreement. To fall within section 2.3(b) a claim must be based *entirely* on events arising prior to the closing date, December 17, 1979. Thus, the first-party claim does not fall within section 2.3(b).[6]

Carleton bases its indemnification claim on section 12.1 of the Agreement, in which FRI promised to indemnify Carleton for costs resulting from FRI's breach of the Agreement. Because Carleton has failed to demonstrate a breach, it cannot prevail on Count II.

B. FRI's Counterclaims

Carleton has moved to dismiss FRI's counterclaims. As the First Circuit has explained, "if under any theory [the claims] are sufficient to state a cause of action in accordance with law, a motion to dismiss the complaint must be denied." *Knight v. Mills,* 836 F.2d 659, 664 (1st Cir. 1987); *see Wyman v. Prime Discount Sec.*, 819 F. Supp. 79, 81 (D. Me. 1993) ("[T]he Complaint should not be dismissed unless it appears beyond doubt that Plaintiffs can prove no set of facts which would

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[5] (...continued)
Exh. B to Second Amended Third-Party Complaint at 2. Moreover, the document confirms that Andy Valley Refuse Co. disposed of Carleton's wool waste at the Site, *see id.* at 2-3, as alleged by counsel for the first-party plaintiffs. *Accord* LeVeen Aff. ¶¶ 2, 9 (both FRI's predecessor and Carleton disposed of trash at Site; such disposal continued until late 1982).

[6] I also reject Carleton's argument that the first-party claim was based on arrangements made by FRI before the closing date. The first-party claim was based on the actual waste dumping, not mere arrangements to do so.

entitle[] them to relief.").

In its first counterclaim FRI alleges that Carleton breached the duty of good faith and fair dealing implied in the Agreement. It claims that Carleton breached this duty by: (1) demanding that FRI indemnify it for its costs in the first-party action; (2) prosecuting the third-party action; and (3) incurring excessive and unreasonable attorney fees and costs in the first-party action.[7]

Under Delaware law[8] "an implied covenant of good faith and fair dealing is engrafted upon every contract." *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985) (citing, inter alia, *Restatement (Second) of Contracts* § 205 (1981)). Carleton argues that FRI has improperly cast a claim for bad-faith litigation as a breach-of-implied-covenant claim. Yet, "[t]he obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute [or] asserting an interpretation contrary to one's own understanding . . . ." *Restatement (Second) of Contracts* § 205, cmt. e (citations omitted). It is possible that FRI could prove that Carleton made its demand and prosecuted this action with the knowledge that its position was meritless, thus breaching the implied covenant of good faith and fair dealing. *See Cohn v. Taco Bell Corp.*, No. 92-C-5852, 1995 WL 247996 at *7-8 (N.D. Ill. Apr. 24, 1995) (allegation that plaintiffs urged construction of agreement so clearly contradicted by its language that they knew it was meritless held sufficient to state claim for breach of implied covenant of good faith and fair dealing); *Riveredge*

[7] The third allegation, incurring excessive fees, could only constitute a breach if the first-party claim fell within section 2.3(b), which obligates FRI to pay expenses arising out of Carleton's reasonably necessary steps to protect FRI's interests. As I have already found section 2.3(b) inapplicable here, the third allegation cannot constitute a breach by Carleton.

[8] Section 14.6 specifies that Delaware law governs the Agreement.

Assocs. v. Metropolitan Life Ins. Co., 774 F. Supp. 897, 899-900 (D.N.J. 1991) (allegation that plaintiff brought action with knowledge that it was not entitled to relief sought under agreement held sufficient to state claim for breach of implied covenant of good faith and fair dealing). Accordingly, I recommend that Carleton's motion to dismiss be denied as to counterclaim I.

FRI's second counterclaim, that Carleton breached the Agreement by failing to act reasonably in protecting FRI's interests, assumes that the first-party claim falls within section 2.3(b) of the Agreement. Having found that it does not, I recommend that Carleton's motion be granted as to this counterclaim.

In its third counterclaim FRI seeks indemnification, pursuant to section 12.2, for costs arising out of Carleton's breaches alleged in counterclaims I and II. Insofar as this counterclaim deals with the breach asserted in counterclaim II, I recommend that Carleton's motion be granted. However, insofar as this counterclaim rests on a breach of the covenant of good faith and fair dealing, I recommend that Carleton's motion be denied.[9]

Finally, FRI seeks a declaratory judgment that Carleton has breached its obligations under the Agreement, including but not limited to its covenant of good faith and fair dealing. Because of my findings on counterclaims I and II, I recommend that this counterclaim be dismissed, except as it relates to a breach of the implied covenant of good faith and fair dealing.

IV. Conclusion

For the foregoing reasons, I recommend that Carleton's motion for summary judgment be

[9] As Carleton has not disputed whether section 12.2 applies to breach of an implied covenant, I do not consider the issue.

DENIED, that FRI's motion for summary judgment be ***GRANTED***, and that Carleton's motion to dismiss FRI's counterclaims be ***DENIED*** as to Counterclaim I (Breach of Implied Covenant of Good Faith and Fair Dealing), ***GRANTED*** as to Counterclaim II (Breach of Contract), and, as to Counterclaims III (Indemnification) and IV (Declaratory Judgment), ***GRANTED*** insofar as the same depend on Counterclaim II and ***DENIED*** insofar as they depend on Counterclaim I.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 15th day of February, 1996.

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David M. Cohen
United States Magistrate Judge